IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHRISTINE MELONI,	)	
	)	
Claimant-Below/	)	
Appellant,	)	
	)	C.A. No. 05A-12-009 MJB
v.	)	
	)	
WESTMINSTER VILLAGE,	)	
	)	
Employer-Below/	)	
Appellee.	)	

Submitted: May 22, 2006
Decided: August 17, 2006

On Appeal From the Industrial
Accident Board.
AFFIRMED.

OPINION AND ORDER

Matthew M. Bartkowski, Esquire, Kimmel, Carter, Roman & Peltz, P.A., Wilmington, Delaware, Attorney for Appellant.

Kimberly A. Harrison, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, Attorney for Appellee.

BRADY, J.

Procedural History

This is an appeal from a decision of the Industrial Accident Board ("Board").[1] The issue is whether the Board properly granted the request of Westminster Village ("Employer") to terminate benefits being received by Christine Meloni ("Claimant") due to a work related injury. A hearing on the merits took place before the Board on November 9, 2005. The Board issued a decision on December 12, 2005 granting Employer's petition to terminate benefits. Claimant filed an Appeal from the Board decision on December 23, 2005. This is the Court's Opinion and Order on Appeal.

Standard of Review

The Court has a limited role when reviewing a decision by the Industrial Accident Board. If the decision is supported by substantial evidence and free from legal error,[2] the decision will be affirmed.[3] Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion.[4] The Board determines credibility, weighs evidence and makes factual findings.[5] This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the

[1] This case was decided by a Hearing Officer in place of the Board. Pursuant to DEL. CODE ANN. tit. 19, § 2301B(a)(4) the Hearing Officer sits with the full authority of the Industrial Accident Board. Therefore, the Hearing Officer will be referred to in this opinion as the "Board."
[2] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[3] *Sirkin and Levine v. Timmons*, 652 A.2d 1079 (Del. Super. Ct. 1994).
[4] *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994).
[5] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66-67 (Del. 1965).

Board.[6] "[T]his Court will give deference to the expertise of administrative agencies and must affirm the decision of an agency even if the Court might have, in the first instance, reached an opposite conclusion."[7] Only when there is no satisfactory proof in support of a factual finding of the Board may this Court overturn it.[8] The Board's legal interpretations are subject to plenary review. "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below."[9]

Facts

On June 28, 2003, while Claimant was working a certified nursing assistant for Employer, Claimant sustained a compensable injury to her lower back and left leg while trying to help a stroke patient into an upright position to eat his meal.[10] Claimant received temporary partial disability from March 17, 2004 through September 14, 2004 and a period of temporary total disability beginning December 1, 2004 at a total compensation rate of $266.50 per week, based on an average weekly wage of $399.75 at the time of injury.[11]

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[6] *Id* at 66.
[7] *Brogan v. Value City Furniture*, 2002 WL 499721 at *2 (Del.Super.).
[8] *Johnson v. Chrysler Corp*., 213 A.2d at 67.
[9] *General Motors Corp. v. Parker*, 1999 WL 1240820 (Del.Super.).
[10] IAB Hearing No. 1234424 *Transcript* at 36.
[11] IAB Hearing No. 1234424 *Decision* at 2.

After the injury Claimant treated conservatively with Dr. Rowe and Dr. Godfrey. Claimant received medication, physical therapy and pain management injections for her injuries.[12] A July 1, 2003 MRI showed a subtle left paracentral disc protrusion.[13] Claimant was then referred to Dr. Kalamchi, a spine surgeon, who performed surgery on her back on September 15, 2004.[14] Claimant underwent a second surgery on October 15, 2004 to repair a spinal fluid leak.[15]

Dr. Case, an orthopedic surgeon, testified by deposition on behalf of Employer.[16] On the first visit with Dr. Case on November 15, 2004 Claimant was still out of work and following a post-surgery treatment plan with Dr. Kalamchi.[17] She underwent therapy for one week, but stopped due to spasms.[18] Dr. Case examined Claimant and concluded Claimant would require an additional eight to twelve weeks out of work before she could return to light duty assignments.[19] Dr. Case examined Claimant again on June 27, 2005. She related to Dr. Case that she had undergone hydrotherapy beginning on October 25, 2004 and the fusion was doing well.[20] Claimant

[12] *Transcript* at 37.
[13] *Decision* at 2.
[14] *Id*.
[15] *Id*; Appellant Exhibit 3 (Dr. Case Deposition) at 5.
[16] *Decision* at 2.
[17] *Decision* at 3.
[18] *Id*.
[19] Dr. Case Deposition at 5.
[20] *Decision* at 3.

also told Dr. Case that her left leg would sometimes give out, and she experienced pain and tingling in her left leg.[21] Dr. Kalamchi had released Claimant for light duty work twenty four hours per week, but Claimant represented that light duty work was unavailable.[22] Claimant could perform light housework and was doing stretching and walking in water.[23] After performing a physical examination of Claimant, Dr. Case determined Claimant could perform full time sedentary to light duty work with restrictions.[24] The restrictions included avoiding bending and twisting, avoiding continuous standing and no lifting over fifteen pounds.[25] Dr. Case believed Claimant could improve and return to light to medium duty work in the future.[26] In spite of this opinion, as of June 2005 Claimant could not return to her former work as a certified nursing assistant.[27] Dr. Case reviewed a labor market survey and agreed that the jobs in the survey were sedentary to light duty in nature and within the restrictions he had imposed on Claimant.[28] In August 2005 Dr. Kalamchi released Claimant for light duty work.[29]

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[21] *Id* at 6.
[22] *Id* at 3.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id* at 7; *Transcript* at 40.

Renee Gleckner ("Ms. Gleckner"), a vocational expert, prepared a labor market survey to identify jobs available in the marketplace that fit Claimant's educational, vocational and physical abilities.[30] Claimant is a high school graduate and trained as a certified nursing assistant. Prior to her work for Employer, Claimant worked as a receptionist, a general manager for Daystar Sills, and an assistant manager at a gas station.[31] After she was injured, Claimant worked as a visiting nurse for approximately one year.[32] From this information, Ms. Gleckner concluded that Claimant had clerical skills and significant management experience.[33] Claimant had transferable skills in customer service, management, clerical and medical work.[34]

Ms. Gleckner testified that there were employers from nine jobs in the labor market survey that were available on the dates identified and who would hire someone with Claimant's working restrictions.[35] A service position at a call center with a desk and a keyboard paid $380 per week.[36] A motor vehicle specialist position involved all clerical duties and required no lifting over five pounds. The pay rate depended on experience, but fell

[30] *Transcript* at 9.
[31] *Decision* at 4.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Transcript* at 15.
[36] *Decision* at 5.

within a range of $437 to $537.96 per week.[37] A security dispatcher position was sedentary and paid $300 per week.[38] The average weekly wage of the jobs identified in the labor market survey was $411.06.[39]

Gleckner agreed that Claimant had applied for approximately fifty jobs, including positions such as hostess, teller, medical billing, legal receptionist and with employment agencies. Ms. Gleckner recommended Claimant change the scope and objective of her standard resume and cover letter to maximize her chances of obtaining suitable employment because her cover letter indicated she was looking for a job in the healthcare field.[40] In addition, her physical restrictions were not stated on her resume.[41]

Claimant testified she could return to work.[42] Claimant also testified that for a significant number of the jobs to which she applied, she sent her resume by regular mail or electronic mail and did not follow up in person.[43] Claimant further testified there was nothing in the materials she sent to potential employers that indicated she had any work restrictions.[44] Claimant agreed that the employers were not basing their hiring decisions on her job

[37] *Id*.
[38] *Id*.
[39] *Transcript* at 20.
[40] *Transcript* at 32-33.
[41] *Decision* at 5.
[42] *Transcript* at 51.
[43] *Id* at 53-54.
[44] *Id* at 54-55.

restrictions, because they did not know about her job restrictions.[45] Claimant also testified she applied for some jobs without knowing whether there were openings available.[46]

Claimant only applied for jobs she believed she could physically perform.[47] Claimant testified she inspected the New Journal, Delaware State News, Smyrna/Clayton Times, Dover Post, online postings, and made trips to the unemployment office in Dover to search for jobs.[48] Initially, Claimant limited her job search to the healthcare field.[49] Claimant was hired as a certified nursing assistant by State Street Assisted Living, but discontinued her employment after one shift because of the resulting pain.[50] Claimant was later offered a different job there as an activity assistant, but could not do the job due to migraine headaches.[51] After two days, on each of which Claimant was sent home due to headaches, she was terminated.[52]

[45] *Id* at 7.
[46] *Id* at 59.
[47] *Decision* at 7.
[48] *Transcript* at 46.
[49] *Id* at 40.
[50] *Id* at 43-44.
[51] *Id* at 44-45.
[52] *Id* at 45.

Contentions of the Parties

Claimant argues the Board erred when it found she was not a displaced worker because it also found she had conducted a diligent job search and applied to all the jobs listed on the labor market survey.[53] Claimant also argues that each employer on the labor market survey knew of Claimant's physical restrictions before she applied for a position with them because Ms. Gleckner called them and informed them of her physical limitations.[54] Therefore, Claimant argues, it is clear she is a displaced worker because she conducted a diligent job search and was presumably not hired because of her physical limitations.[55]

Employer counters by stating that while Claimant's job search may have been reasonable, she still does not qualify as a displaced worker because she did not prove she was unable to procure a job due to her work injury.[56] Employer further argues that there is no evidence in the record to support the claim that Ms. Gleckner informed all of the employers listed in the labor market survey of Claimant's physical limitations by specifically referencing Claimant by name.[57]

The Board found in favor of Employer.

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[53] *Appellant Opening Brief* at 8-9.
[54] *Id* at 9.
[55] *Id*.
[56] *Appellee Opening Brief* at 10.
[57] *Id* at 12.

Applicable Law and Analysis

Displaced Worker Status

When an employer files a petition to terminate an employee's total disability benefits, that employer bears the initial burden of demonstrating that the employee is no longer totally incapacitated from working.[58]

Even if a worker is not totally physically disabled, that person can still be totally disabled economically pursuant to the "displaced worker" or "odd lot" doctrine.[59] A clear explanation of the doctrine is set forth in *Ham v. Chrysler Corp.*:[60]

> The term is used to refer to a worker who, while not completely incapacitated for work, is so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if he is to be steadily employed.[61]

The burden of proof in the displaced worker arena shifts from the employee to the employer depending on the factual circumstances of each case:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training, or age, places the employee Prima facie in the 'odd-lot' category, as defined in Hartnett and Ham, the burden is on the employer, seeking to terminate total disability compensation, to show the availability

[58] *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. Ct. 1973).
[59] *Ham v. Chrysler Corporation,* 231 A.2d 258, 261 (Del. 1967)
[60] *Id*.
[61] *Id* at 261.

> to the employee of regular employment within the employee's capabilities…If on the other hand, the evidence of degree of physical impairment, coupled with the other specified factors, does not obviously place the employee Prima facie in the 'odd-lot' category, the primary burden is upon the employee to show that he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury; upon such Prima facie showing of 'odd-lot' classification, the Ham burden of proof is imposed upon the employer, seeking to terminate total disability compensation, to show availability to the worker, thus 'displaced,' of regular employment within his capabilities.[62] (Emphasis added.)

Initially, the Court notes Claimant does not dispute she is able to return to work.[63] Additionally, Claimant's injuries do not obviously place her in the displaced worker category. Claimant has multiple competencies, skills and abilities that could be utilized in the work force. Therefore, Employer has met the initial burden of demonstrating that the employee is no longer totally incapacitated for the purpose of working. In addition, it does not appear, from the record, that Claimant attemped to prove she was a *prima facie* displaced worker as that term has been construed in the jurisprudence of this state.[64] Consequently, the scope of this appeal, and the analysis of this Court on review, is whether Claimant made "…reasonable efforts to secure suitable employment which have been unsuccessful because

[62] *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)
[63] *Transcript* at 51.
[64] *Decision* at 8; *Appellant Opening Brief* at 8-10; *Appellant Reply Brief* at 1-3.

of the injury…"[65] and whether Employer can then rebut that showing with proof that jobs are available within Claimant's restrictions.

The Board based the conclusion that Claimant was not a displaced worker not on her lack of a reasonable job search, but on the fact that "Claimant admitted in her testimony that the employers she contacted did not know about her injury or physical restrictions, and thus they made their hiring decisions on factors other than her physical abilities."[66] This Board correctly applied the standard that must be met by Claimant to be considered a displaced worker. She must prove she is unable to find employment **because of her injuries**. If none of the employers knew of her injuries, as Claimant testified,[67] she could not have possibly been denied employment because of her injuries.

Claimant rebuts this conclusion by arguing Ms. Gleckner testified she informed the employers in the labor market survey of her physical restrictions. Therefore, Claimant argues, she was not hired by these employers **because of** her physical restrictions. A pertinent portion of the transcript is excerpted below:

> Mr. Bartowski: Fair enough. For each of the jobs listed on the Labor Market Survey you indicated that you had

[65] *Franklin Fabricators v. Irwin*, 306 A.2d at 737.
[66] *Decision* at 9.
[67] *Transcript* at 54-55.

	asked the employers about my clients [sic] restrictions correct?
Reene Gleckner:	I have identified her restrictions I didn't ask them about them.
Mr. Bartowski:	Okay and you didn't tell each of the various employers that my client had a low back injury correct?
Reene Gleckner:	I did.
Mr. Bartowski:	Okay did you tell them that she had a L5 fusion?
Reene Gleckner:	I didn't go into quit [sic] that I just said she had restrictions due to a back injury…

In response to this testimony the Board stated "Gleckner told prospective employers about Claimant's work restrictions and told them she had a low back injury."[68]

While it is clear that those nine employers on the list prepared by Ms. Gleckner were aware of the Claimant's injury and restrictions, it is not established in the record that Claimant has met her burden to show she was not hired because of her injuries. Indeed, the record is silent as to why Claimant was not hired by those Employers. Additionally, Claimant made inquiries to approximately fifty employers that were not listed in the labor market survey. Claimant testified these employers were unaware of her physical restrictions. The inquiries Claimant made to the nine employers listed in the labor market survey represent only a small portion of employers Claimant contacted. "Thus, most of the employers she contacted could not

[68] *Decision* at 5.

have refused to hire her because of her injury since they knew nothing about it."[69] The Court holds the record, including the notice to nine employers in the labor market survey, is inadequate to demonstrate that Claimant's job search was unsuccessful because of her injuries.

Because Claimant did not meet her burden to show that her admittedly reasonable efforts to secure suitable employment were unsuccessful because of her injuries, the burden to prove availability to the Claimant of regular employment within her capabilities never shifted to the Employer. However, Employer still made a showing that regular employment was available to Claimant within her capabilities by providing her with the labor market survey of jobs that she could perform with her physical limitations. The Board found "[t]his survey effectively rebuts any assertion that no work is available in the marketplace within Claimant's physical restrictions."[70] The Court agrees with this holding. Since jobs exist in the marketplace for a person with Claimant's skills and physical limitations, if the burden had shifted to the Employer, the burden would have been met. Therefore, the Board's holding is free from legal error and supported by substantial evidence.

[69] *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1996).
[70] *Decision* at 9.

Claimant's Contentions Regarding the ADA and DHPEPA

Claimant argues the displaced worker doctrine violates her rights under 42 U.S.C.A. § 12112(d)(A), The Americans With Disabilities Act of 1990 ("ADA"), and DEL. CODE ANN. tit. 19, § 724, The Delaware Handicapped Persons Employment Protections Act ("DHPEPA"). Specifically, Claimant argues the displaced worker doctrine violates § 12112(d)(A) of the ADA because that section prevents an employer from asking a job applicant whether they are an individual with a disability, or as to the nature and severity of the disability.[71] Claimant also argues the displaced worker doctrine violates her rights under DHPEPA because it prohibits an employer from inquiring of an applicant whether the applicant is handicapped prior to employment.[72]

[71] *Appellant Opening Brief* at 11.
[72] *Id*.

Twice previously, this Court has addressed similar contentions. In both *Keeler v. Metal Masters, Inc*.[73] and *Crump v. Best Temps*,[74] the Court came to the conclusion that the ADA and DHPEPA do not conflict with the displaced worker doctrine. This Court agrees and adopts their holdings in this case.

Conclusion

For the reasons set forth herein the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[73] 1997 WL 855721 (Del.Super.)
[74] 1999 WL 743677 (Del.Super.), *Aff'd*., 735 A.2d 386 (Del. 1999).